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ABSTRACT

In this paper changes in labor force participation for women in North Carolina are examined and projected into the future. The projections demonstrate that the number of employed females, especially mothers, will be much greater in the future than at present. Thus, the issues related to female labor force participation will be even more salient in the year 2000 than today. These issues include the types of jobs occupied by and educational background of women, the care of infants and children, and the legal issues raised by discrimination against women in the work place. Each of these issues is examined in detail and particular attention is given to their policy implications. A partial list of issues considered worthy of attention includes day care, delayed child bearing, work arrangements, volunteerism, lower fertility, Social Security and other public pension plans, declining school population, and national defense. In the final section of the paper, a detailed analysis of legal solutions to the problem of equal pay for women, focusing especially on the doctrine of comparable worth, is provided. The desirability of states' adopting a comparable worth standard is discussed in terms of equity, preference satisfaction, stigma, efficiency, political and technical feasibility, and cost. (RH)

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Women in the Labor Force:
Trends, Consequences, and Policy Implications

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Women in the Labor Force: Trends, Consequences, and Policy Implications

John Musewicz, Paul Jellinek, and Gary D. Gaddy

Introduction

More women are in the labor force now than ever before. Nor will this trend end in the near future. Some argue that labor force participation has been the linchpin of major changes in the roles, self perceptions, and behavior of American females over the past 20 or so years. In this paper, we intend to examine changes in female labor force participation, particularly for North Carolina women, and to project these changes into the future. The projections demonstrate that the number of employed females--especially mothers--will be much greater in the future than at present. Thus, the issues attendant to female labor force participation will be even more salient in the year 2000 than they are today. These include the types of jobs occupied by and educational background of women, the care of infants and children, and the legal issues raised by discrimination against women in the work place. We examine each of these issues in detail below, while paying particular attention to their policy implications. In the final section of the paper, we provide a detailed analysis of legal solutions--and especially the doctrine of comparable worth--to the problem of equal pay for women.

Projected Labor Force Participation by North Carolina Women in the Year 2000

Rate of Participation

The projections presented here of labor force participation rates (LFPR's)[1] by North Carolina women in the year 2000 were derived by adjusted extrapolation from the national to the state level. At the national level, two sets of fairly recent projections of women's LFPR's were identified, one by the U.S. Labor Department's Bureau of Labor Statistics (BLS, 1980, p. 147), the other by Personick (1980; see Table 1).

On the basis of these projections, a national LFPR for women of 61.4% was assumed for 1990. This rate constitutes the mean of Personick's high and low projections. Personick's projections were adopted as reference points in favor of those by the BLS largely because of the apparent tendency of BLS projections to substantially underestimate women's LFPR's (Fullerton, 1982).

In extrapolating from the national to the state level, an upward adjustment of 2.0% was made, yielding a projected LFPR of 63.4% for North Carolina women in

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[1]The labor force participation rate is the percentage of the population in question--in this case, working women 16 years old or more--that is employed or is actively seeking employment (Fleisher & Kniesner, 1980).

Table 1

National Projections of Women's Labor Force

Participation Rates For the Year 1990

Type of Estimate	Source	
	Bureau of Labor Statistics	Personick
High	61.2	63.2
Medium	57.2	—
Low	53.9	59.6

Sources: Labor Statistics Handbook, Bureau of Labor Statistics, Dept. of Labor, Bulletin 2070, Washington, DC, December 1980, p. 147; Personick, V.A., "The Outlook for Industry Output and Employment Through 1990", Monthly Labor Rev., 104 (9) August 1980, p. 28-41.

1990. This 2.0 per cent adjustment was made somewhat arbitrarily to account for what appear to be higher-than-average LFPR's for North Carolina women. In particular, the most recent available data on LFPR's by sex for North Carolina indicate that in 1970, the LFPR for North Carolina women was 46.5% (Research and Planning Service, 1979, p. 306), compared with 43.4% for U.S. women as a whole (U.S. Bureau of Labor Statistics, 1980, p. 9). This 3.1% differential is due in part to the disproportionately low wage rate paid in North Carolina,[2] which would be expected to induce women to enter the labor force in an effort to supplement unacceptably low family incomes. The reduction of the 3.1% differential reported for 1970 to 2.0% in the projections made here is premised on the assumption that through in-migration of skilled frost-belt labor, reindustrialization, and increased education, North Carolina wages will gradually begin to converge toward the national mean over the next few decades.

In making the extrapolation from the 1990 projection derived from Personick to the year 2000 projection required for present purposes, two alternate assumptions were applied:

1. that the average annual rate of change in the North Carolina's women's LFPR from 1990 to 2000 would equal the average annual rate of change from 1979 to 1990;

2. that the average annual rate of change from 1990 to 2000 would equal the average annual rate of change from 1970 to 1990.

The difference between the two rates (1979-90 vs. 1970-90) is relatively small: both assume a more or less steady increase in participation rates. It is assumed, in other words, that no inherent "saturation level" exists for the pool of working age women above which participation rates will not rise, or, if there is such a level, that it will not be reached before the year 2000. This assumption is grounded on the beliefs that: (a) the kinds of cultural value changes that have accompanied and reinforced recent changes in marriage, fertility, and child care patterns are quite profound and not readily reversible (Yankelovich, 1981); (b) recent educational gains by women are likely to persist or even increase (see below), thereby raising women's earning capacity and promoting labor force participation (Polachek, 1975); and (c) the rising dependency ratio of retired workers to employed workers will exert increasing pressure on family living standards (National Commission on Social Security, 1981), creating continued incentives for women to enter the labor force in order to supplement family earnings.

On the other hand, it should be emphasized that the women's labor market is a volatile one, subject to sudden discontinuous changes. It is, in fact, precisely this volatilty that Fullerton (1982) cites as a primary cause of past underestimates of overall labor force performance. Consequently, any projections of future women's LFPR's should be regarded as, at best, tentative. A recent report of substantial and unexpected perturbations in the market for nurses serves to underscore the point (Dolan, 1983).

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[2]In 1970, North Carolina workers were paid the second lowest hourly wage in the country (only Mississippians received less); in 1977, the lowest (U.S. Bureau of the Census, 1978, p. 424).

Using the average annual rate of change in women's LFPR's from 1979 to 1990 (1.98%), the extrapolated North Carolina women's LFPR for the year 2000 is projected at 77.1%, a 30.6 point increase over the 46.5% rate reported for North Carolina women in 1970. Using the average annual rate of change from 1970 to 1990 (1.91%), the extrapolated LFPR for the year 2000 is projected at 76.6%, a 30.1 point increase over the 1970 rate.[3]

Number of Participants

In order to project the actual number of women participating in the North Carolina labor force in the year 2000, use was made of state-by-state population projections for the year 2000 reported in the 1978 U.S. Statistical Abstract (U.S. Bureau of the Census, 1978, p. 16). Three projections were reported for North Carolina. Projection A, at 6,830,000, was made under the assumption that 1965-75 migration patterns would prevail; projection B, at 7,226,000, assumed 1970-75 migration patterns; and projection C, at 6,426,000, assumed no interstate migration after 1975.

To estimate the share of females in the population, state-level projections of population sex composition were used. According to these projections, North Carolina's population will be 51.7% female in July, 1983, and 52.0% female in July, 1990 (Research and Planning Service, 1978, p. 38).

For present purposes, the 52.0% level was assumed to persist through the year 2000, rather than continuing to rise in the manner projected from 1983 to 1990, on the grounds that the increase in women's labor force participation should gradually begin to reduce the life expectancy differential that exists between males and females (Women and Health, 1980, p. 33-35).

Drawing next upon national-level middle ground projections indicating that 76.6% of the total female population in the year 2000 will be of working age (16 years old or more; U.S. Bureau of the Census, 1978, p. 8) and multiplying this share by the 52.0% share of females in North Carolina assumed above, it was calculated that 39.8% of the total North Carolina population in the year 2000 would be comprised of working age women.

Applying this rate to projections A, B and C for North Carolina's total population in the year 2000, the number of working age women in North Carolina in the year 2000 comes to 2,718,000, 2,876,000, or 2,558,000 respectively.

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[3]Calculations were made with the standard compounding formula:

$63.4 = 51.1\ (1 + r_A)^{11}$ $\qquad r_A = (63.4/51)^{1/11} - 1 = 0.0198$

$63.4 = 43.4\ (1 + r_B)^{20}$ $\qquad r_B = (63.4/43.4)^{1/20} - 1 = 0.0191$

$63.4\ (1 + 0.0198)^{10} = 77.1$

$63.4\ (1 + 0.0191)^{10} = 76.6$

These figures were then simply multiplied by the two LFPR's calculated earlier, yielding six alternative projections of the actual number of women expected to participate in North Carolina's labor force in the year 2000 (see Table 2).

Projected Educational Status of North Carolina Women

National Trends in Education:

One indicator of future trends in women's labor force participation is their present educational participation. The course of study which a woman pursues, beginning in high school and continuing on through higher education (if she advances that far), is a major determinant of her future occupational status. Significant changes in the occupational status of women, including both the types of jobs and the kinds of industries in which they work, suggest probable or even necessary changes in the structure and function of the family. These changes may alter the relationship of the family to society in general, creating the necessity for new or different family policies.

As demonstrated above, the rate of labor force participation by women has been steadily rising. In 1972 females made up 38.0% of the national labor force; by 1981 the figure had risen to 42.8% (Bureau of Labor Statistics, 1982). But while females have been for some time a substantial proportion of the labor force, they have not participated equally in every occupational category. The data in Table 3 permit two obvious generalizations. First, women make up a tiny fraction of some occupations and the overwhelming majority of other occupations. Thus, for example, whereas women make up only about 4% of engineers and 14% of lawyers, they make up about 45% of sales workers and 99% of secretaries. Second, the patterns of job distribution for females changed somewhat between 1972 and 1981. More specifically, the percentage of women lawyers more than tripled--from 4 to 14%--and the percentage of female administrators likewise jumped dramatically, from 18 to 28%.

That the shifts in occupational status that have taken place over the last decade will continue is suggested by long-term trends in enrollment in educational institutions. Since World War II the proportion of women in higher education has risen steadily from 31.8% in the fall of 1946 to 51.3% in the fall of 1980 (Grant & Eiden, 1982, p. 95). Women were, in the fall of 1980, a majority of undergraduate students (51.5%), and a nearly equal portion of graduate students (48.2%); they are also a growing minority of professional students (28.4%). Further, as Grant and Eiden (1982, p. 99) show, the proportions are increasing even in fields which are predominantly male, such as engineering (12.8% of undergraduate students and 8.9% of graduate students) and medicine (25.8%). If viewed from the perspective of amount of change, rather than a goal of numerical parity, these data indicate substantial and continued upward shifts in the occupational status of women.

These changes in patterns of higher education are also paralleled by shifts in secondary education. In particular, the rate of high school dropout among women has decreased at a more rapid rate than that of males in the past decade. In the fall of 1970, 17.7% of all females between 14 and 34 were high school dropouts as compared to 16.2% of all males between 14 and 34. By the fall of 1980, the percentages were 12.8 for females and 13.2 for males (Grant & Eiden, 1982, p. 68).

Table 2

Alternative Projections of the Number of Women

in the North Carolina Labor Force in the Year 2000

LFPR Rates	Population Projections[a]		
	A	B	C
77.1%	2,096,000	2,217,000	1,972,000
76.6%	2,082,000	2,203,000	1,959,000

[a]See text for explanation of these population projections.

Table 3

Proportions of Females in Selected Occupations in 1972 and 1981

Year	Occupation					
	Engineers	Lawyers	Physicians	Administrators	Sales Workers	Secretaries
1972	0.8%	4.0%	10.1%	17.6%	41.6%	99.1%
1981	4.4%	14.1%	14.4%	27.5%	45.4%	99.1%

Source: Bureau of Labor Statistics, 1982, pp. 651-667.

In general, the national data available for courses taken by high school students indicate a general equivalence between the curricula of males and females, with a few clear exceptions that follow the patterns of higher education and occupation reviewed above. While males and females are equally likely to follow an academic or vocational track, within those tracks some clear sex differences emerge. Within the academic track, males are substantially more likely to take advanced math and science courses than females. But again these differences appear to be less dramatic than the differences at higher educational levels. For example, 39% of males report having taken 3 years or more of math compared to 28% of females; 27% of the males report having taken 3 years or more of science compared to 19% of the females.

Within the vocational/technical track, females are more likely to take sales and business courses, while males are more likely to take trade-industry or technical courses. More specifically, 19% of females report taking 3 years or more of business and sales courses compared to only 4% of the males. By contrast, 23% of males report taking 2 years or more of trade-industry courses as compared to only 4% of females. For technical courses, 16% of males and 3% of females report taking 2 years or more (Grant & Eiden, 1982, pp. 70-71). These numbers suggest that while there may be some change in the gender structure of the blue-collar and service sectors of the economy, these changes may not be as large, or come as soon, as the changes in the professional sector.

Education in North Carolina

While these statistics demonstrate substantial and continuing changes in the pattern of education for women nationally, and suggest parallel changes in the pattern of occupation, a question may be raised as to how relevant they are to women in North Carolina. A comparison of some state and national statistics indicates many similarities, and some differences, between North Carolina and the nation as a whole.

In many ways North Carolina is near the bottom nationally in educational attainment, but because of the state's current commitment to education shows promise of moving up. The state ranks 45th in the number of years of education completed, with median years completed of 12.2 compared to a national average of 12.5 (Grant & Eiden, 1982, p. 17). While North Carolina is 32nd in the nation in the amount per capita it spends on education ($542.45 in 1979-80 compared to a national average of $588.11), because of its lower per capita income it ranks 16th in the nation in the percent of per capita income it spends on education (7.6% compared to 6.8% nationally; Grant & Eiden, 1982, p. 24). In higher education, North Carolina is a leader among the states in the education of students from other states, ranking fifth in the net migration of students, receiving 8,983 more students than it sent out in 1979 (Grant & Eiden, 1982, p. 90). As shown in Table 4, North Carolina females are quite similar to those in the nation as a whole with respect to fields of study. Only in biology, business, and math do North Carolina women differ from the national average by more than a few percentage points, and in all three of these fields, North Carolina is higher.

Taken together, these numbers suggest that the proportion of women in North Carolina in higher status, and traditionally male, educational tracts is as great or greater than the national proportions.

Table 4

Percent of Degrees Conferred on Females in Selected Fields of Study: United States and North Carolina Compared[a]

Geographic Area	Field of Study					
	Biology	Business	Education	Engineering	Math	Physics
U.S. (1979-80)	40.5%	31.0%	71.2%	8.7%	39.8%	21.8%
N.C. (1980-81)	49.6%	39.2%	71.9%	11.8%	52.1%	21.6%

[a]These figures include all bachelors, masters, first professional, and doctoral degrees.

Sources: U.S. data taken from Grant & Eiden, 1982, p. 117-121; North Carolina data taken from Balfour, 1982, p. 81-82.

Labor Force Participation and Child Care

In broad terms these data suggest that the number of women working will continue to increase, and that the areas of greatest growth will be in the occupations that have traditionally been male--both in the higher status professions and in manual labor occupations. A greater number and proportion of women working outside the home will mean a greater demand for child care services, and fewer women available to provide in-home care. This increase may be substantial--recent national statistics indicate that more than 90% of children under 5 of women who do not work outside the home are reared exclusively at home. By contrast, of the children of mothers who work part time, 66% are taken care of outside their own home, or by a nonrelative in their own home. For children whose mothers work fulltime, 78% are taken care of outside the home (Lueck, Orr, & O'Connell, 1982).

The substantial increase in number of children needing child care indicated by these statistics, and the shrinking pool of "non-working" women to keep them, suggest that a major increase in group care arrangements will have to take place in the next 20 years. One method for determining how such a situation might be dealt with is to look for a country that has already faced, and dealt with, the problem. Sweden is one example of such a country. In 1975, the labor force participation rate for Swedish women was 74% (Lueck, Orr, & O'Connell, 1982)--almost as high as the projected rate for North Carolina (about 77%) in the year 2000 (see above). In keeping with Sweden's extensive social welfare system, there is a Parental Insurance Scheme which provides either parent with up to 9 months pay after the birth of a child, and additional paid leave for care of a sick child. Additionally, there are income supplements and tax deductions for child rearing expenses. The number of places in day care centers in 1980 was 100,000, up tenfold from 1965.

These measures taken by the Swedish government clearly demonstrate concerns going beyond just a general social interest in the welfare of children. In particular, the high labor force participation of women, perhaps combined with other factors, has lead to a substantial decline in the Swedish fertility rate, so much so that there is societal worry over the extinction of Swedish culture. Importantly, given the long term trend of increasing occupational status among American women, this may herald a future problem for the United States.

Legal Issues

As the number of women in the work force continues to grow dramatically, issues of equitable treatment dominate the legal terrain. Equal pay for equal work, non-discriminatory hiring and firing practices, equitable promotional policies, and questions of compensatory policies for past inequities persistently leave their mark on the development of American jurisprudence.

Emergence of the law promoting equal access to the workplace regardless of sex has not been a smooth one. Legal developments, as might be expected, reflect the existing cultural ambiguity concerning working women. The legal principles assuring equal treatment with regard to employment are in place. But their implementation in a manner most fully helpful to women remains illusive. The key legal issues that need resolution in the near future and their policy implications are examined below.

Before turning to employment in the traditional sense, one would be amiss in failing to note the inequities heaped upon the "unemployed" homemaker, usually a woman. While the work of the American homemaker is rhetorically assigned a high social and economic value, institutionally it is all but totally discounted. Homemaking is not covered by the Social Security Act. Consequently, absent an independent income, the homemaker has no financial security at any time based on labors in the home.[4] The financial consequences of such a system may not be realized until the "breadwinner" dies or the marriage dissolves. Then, the personal, and social, tragedy may first be recognized.[5]

Retirement pension plans pose much the same threat to the woman who has chosen homemaking over remunerative employment. Frequently, public and private pension plans provide that if the homemaker dies the formerly employed spouse continues to receive what was being paid the couple. But the surviving dependent homemaker often receives only half that amount.[6]

It seems important, arguably, that a society which prides itself on a commitment to families and children take into account the perceived (if not empirically provable) social benefits derived from the full-time homemaker. But this is not done. One of the consequences is that more and more women are literally forced into remunerative employment regardless of any child rearing and homemaking desires. It is to the issues of women in the work place, by choice or necessity, which we now turn.

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[4]Legal rubric would call this a disparate effect. While the Social Security Act is gender neutral with respect to homemaking, the consequent effects of non-coverage disproportionately fall on women who still usually shoulder traditional homemaking responsibilities.

[5]Welfare under the Aid for Dependent Children program may be the only recourse. Even the employed spouse is not without risk. If the homemaker should die, the employed spouse and children have no social security benefits to offset the loss of the valuable homemaking services.

[6]See C. Thomas, Sex Discrimination 167 (1982). Even working women are frequently disadvantaged by private pension plans. Vesting of rights under such plans often subtly work against women by requiring continuous employment periods not commensurate with female life styles which not infrequently involve part time work and periods of unemployment due to child rearing responsibilities. See id. at 172. See also id. at 177-78 (disparate negative impact on women of federal Employers Retirement Income Security Act [ERISA]). Intermittent employment patterns common to working mothers may also make it difficult to maintain status for disability insurance. Id. at 172.

In the pension area, the Supreme Court has ruled that sex based actuarial tables cannot be used to determine pension contributions. Los Angeles Dep't of Water & Power vs. Manhart, 435 U.S. 702 (1978). It has now been asked to consider whether annual pension payments can be less for women because of their greater longevity relevant to men. Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1982), petition for cert. filed 51 U.S.L.W. 2242 (November 10, 1982).

Constitutional Issues

The Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Consequently state and local governments cannot legally engage in discriminatory employment practices even if they otherwise qualify for an exception provided by an anti-discrimination statute.

Notably, the amendment is gender neutral. While on its face it prohibits states and municipalities as their legal agents from discriminating against women,[7] it also prohibits discrimination against men. Neither sex, considering solely the text of the amendment, is to receive preferential treatment. However, the courts have been willing to allow affirmative action programs designed to compensate for previous employment practices that discriminated against women[8]--and this despite a debatable constitutional basis.

As will be repeatedly noted, gender neutral legislation and policies may in fact disadvantage women, often due to past discriminations. For example, veterans preferences, frequently employed on the federal, state, and local level, while gender neutral, benefit an enormous number of males but only a few females. Yet the Supreme Court has ruled that such preferences do not violate the Fourteenth Amendment[9] despite the fact that women's armed services participation has been directly limited in the past with a resultant disparate impact on their potential public employment.[10]

Most significantly, the Supreme Court, despite the opportunity to provide women an easier course, has decided that sex discrimination, which allegedly violates the Fourteenth Amendment, can only be demonstrated if the plaintiff can prove that the relevant governmental activity exhibits an invidious intent

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[7]Some frequently thought of private activities funded or otherwise encouraged by states in certain ways are also subject to the fourteenth amendment--an inquiry involving what is state action. See Generally Rosenblatt, Health Care Reform and Administrative Law: A Structural Approach, 88 Yale L. J. 243 (1978).

[8]See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); EEOC v. American Telephone and Telegraph Co., 556 F.2d 167 (3d Cir. 1977), cert. denied sub nom. Alliance Indep. Tel. Unions v. EEOC, 438 U.S. 915 (1978); United States v. Chicago, 549 F.2d 415 (7th Cir.), cert. denied sub nom. Adams v. Chicago, 434 U.S. 875 (1977).

[9]Massachusetts v. Feeney, 442 U.S. 256 (1979). The same result would apparently apply to the federal government under a fifth amendment analysis.

[10]A 2% quota on female enlisted strength was in effect until 1967. In addition, women have had to fulfill more stringent requirements with respect to age, mental and physical aptitude, parental consent and educational attainment. It was not until the 1970s that preclusions against married women or women with dependent children were lifted. See C. Thomas, supra note 3, at 179-80.

to discriminate against women.[11] Any disparate impact, though clearly foreseeable--and no matter how egregious, is not enough.

The clear message is that even an apparent Constitutional protection will not necessarily result in the equitable treatment of women. It is interesting, but, unfortunately, perhaps not surprising, that a woman must show an invidious intent to discriminate even when what is at issue is the employment practices of public employers. One policy alternative, if the value to be promoted is the equal treatment of women, is a federal constitutional amendment which more specifically provides for equal treatment and a lessened burden for proving unconstitutional discrimination. Such a result can also be achieved in a given state through appropriate state legislation.

Federal Statutes

Of more help to women than the Constitution in securing equal employment practices are various federal remedial statutes. Generally, they apply to both public and private employers as long as the federal government can demonstrate a sufficient relationship between the regulated activity and interstate commerce,[12] and a specific statutory exclusion is not met. The implementation of such statutory provisions, though, have met with mixed results.

Equal Pay Act. The Equal Pay Act[13] requires that a given sex member be paid the same for work that is equal or substantially equal to work being performed by an opposite sex member.[14] The statute provides four affirmative defenses which if proved by the employer will justify given wage differentials. Thus, wage differentials may be paid pursuant to a system which considers: (1) seniority; (2) merit; (3) quantity or quality of production; or (4) any other factor other than sex.[15] As part of the Fair Labor Standards Act, the Equal Pay Act applies to both public and private employers unless otherwise exempted.[16]

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[11]Massachusetts v. Feeney, 442 U.S. 256 (1979).

[12]The federal government is constitutionally empowered to regulate matters affecting interstate commerce as well as the actual interstate transportation of goods. U.S. Const., Art. 1, sec. 8, cl. 3. See Gibbons v. Ogden, 9 Wheaton 1 (1824).

[13]29 U.S.C. § 206 (1976).

[14]Equal work is defined as efforts requiring "equal skill, effort, and responsibility . . . [performed under] similar working conditions." 29 U.S.C. § 206 (d)(1)(1976).

[15]29 U.S.C. § 206 (d)(1)(1976).

[16]So that a comparison may be made, there must be at least one male and one female employee in addition to the connection with interstate commerce.

Equal Pay Act problems are obvious. A plaintiff must establish that at least substantially equal work is involved.[17] In doing so, she (or he)[18] must overcome claims of differing work requirements due to: skill, effort and responsibility,[19] additional duties,[20] or a need for greater physical effort more significant than the mental effort required in an otherwise comparable position.[21]

Even if the plaintiff establishes that the work is "equal", a defendant may defeat the claim by proving one of the affirmative defenses. While some of the defenses are relatively precise and therefore more easily evaluated, what constitutes a legitimate merit system is not at all clear or predictable. Moreover, employers frequently invoke the catch-all defense, "any other factor other than sex." Such other factors are often claimed to involve going market wages, profitability, substitute employment, employer training programs, and general subjective considerations.[22] As would be readily expected, separating the subtrefuge from the legitimate "other factor" poses a substantial obstacle for the discriminated against employee.

A state desiring to enhance the equitable treatment of women may wish to adopt its own legislation which makes it easier to win a claim based on unequal pay for substantially equal work. Even more importantly, a state may dramatically enhance equity for women by requiring pay equivalency for jobs of comparable worth, regardless of whether the jobs meet the substantially equal requirement of the Equal Pay Act. The need for comparable worth legislation is addressed in the last section of this paper.

Title VII. The most important federal anti-discimination legislation is Title VII of the Civil Rights Act of 1964.[23] Title VII makes it illegal to discriminate on the basis of sex against any person (gender neutral) with respect to the compensation, terms, and conditions or privileges of employment. The employer is also forbidden from classifying job applicants or employees in any way that would tend to deprive an individual of employment opportunities because of the person's sex. An employer is defined as including not only traditionally thought of employers but also labor organizations and employment agencies which deal with the particular employer. State and local governments and educational institutions are also included.

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[17]Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), cert. denied 398 U.S. 905 (1970).

[18]The Act is gender neutral.

[19]Pearce v. Wichita Cty., 590 F.2d 128 (5th Cir. 1979).

[20]See Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976).

[21]See Hodgson v. Daisy Mfg. Co., 445 F.2d 823 (8th Cir. 1971).

[22]C. Thomas, supra note 3, at 206.

[23]42 U.S.C. § 2000e-2 (1976).

To be covered by the Act, the employer must employ at least 15 individuals for at least 20 weeks of the year or not otherwise be expressly excluded from coverage of the Act.[24] Veterans preferences are exempted from the Act's proscriptions. Importantly, Title VII protects individuals, not persons who offer their goods or services as independent contractors.

Again, general proscriptions against sex-based discrimination may not in fact achieve the desired result in particular circumstances.[25] A case in point is pregnancy. In 1976 the Supreme Court considered whether an employment disability insurance program which excluded pregnancy benefits constituted a sex-based classification in violation of Title VII.[26] The Court ruled that the disability benefits plan did not violate Title VII,[27] reasoning that the class of non-pregnant persons also includes men. The Court found, therefore, that the plan was not a gender-based discrimination at all.[28]

As a result, Congress enacted the Pregnancy Discrimination Act of 1978, amending Title VII. It is now prima facie evidence of a violation of Title VII for an employer to have employment practices of any kind which discriminate against pregnant women,[29] and pregnancy must be treated as any other temporary disability.

The development of the law with respect to pregnancy makes clear that the equitable treatment of working women is, at least for the foreseeable future, an unending process. General platitudes, even though embodied in legislation, cannot guarantee equal treatment through effective implementation. Legislators and regulators must be ever vigilant if the goal of equality is to be realized.

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[24]Once again, the interstate commerce connection must be shown. Excluded employers include the federal government, Congress, Indian tribes and bona fide private tax exempt clubs. 42 U.S.C. § 2000e(b) (1976). North Carolina's anti-discrimination statute also has a 15 employee minimum. No. Carolina Gen. Stat. § 143-422.2.

[25]It should be noted that sex as a prohibited basis for discrimination was only added to the 1964 Civil Rights Act as a late on-the-floor amendment. Consequently, the legislative history of the Act, which ordinarily might be helpful in ascertaining legislative intent, is devoid of information on sex-based discrimination.

[26]In 1974 the Court had ruled that such a program did not violate the equal protection clause of the fourteenth amendment. Geduldig v. Aiello, 417 U.S. 484 (1974).

[27]General Electric Company v. Gilbert, 429 U.S. 125 (1976).

[28]Id. at 137-40.

[29]Pub. L. 95-555, 92 Stat. 2076 (1978) codified at 42 U.S.C. § 2000e (k) (Supp. IV 1980). The Act even covers reinstatement rights with protection for accumulated seniority.

Title VII: Discriminatory treatment vs. disparate effect. Much of Title VII law involves two kinds of alleged discrimination: (1) that involving the discriminatory treatment of a particular person; and (2) that involving a disparate effect on one of the sexes due to an employer's employment practices. We will examine each of these in turn.

Proving discriminatory treatment has been made much more difficult by the Supreme Court's recent decision in Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981). Burdine involved the procedural question[30] of which party bears the burden of proving discriminatory treatment. The Court fashioned a three-step process: (1) the plaintiff has the initial burden of showing that "she [or he] applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination;" (2) the burden of going forward then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the employee's rejection--the defendant "need not persuade the court that it was actually motivated by the proferred reasons;" and (3) the plaintiff must then, to prevail, prove that the reasons articulated by the defendant are a mere pretext.[31]

The Court could have chosen to place on the defendant-employer the burden of proving that its articulated nondiscriminatory reason(s) for rejecting the plaintiff was in fact the actual reason for rejection. Such a rule would have significantly aided the plaintiff alleging sex discrimination in an employment practice. Instead it is the employee who must shoulder the difficult burden of proving an illicit intent on the part of the employer.[32]

It is not difficult to theorize many cases in which neither party will be able to prove the employer's true motive.[33] Assignment of the burden of proof, then, though a procedural rule, determines who wins in those cases.

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[30]While substantive legal matters often capture popular headlines, it was the late Justice Douglas who reminded us that the history of freedom in this country bears a strong relationship to the development of legal process.

[31]101 S. Ct. at 1094-95. "She may succeed in [proving pretext] either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence." Id. at 1095.

[32]The Court reasoned that the employee's access to the EEOC investigatory files and the ability to use the liberal federal document search and deposition rules would be sufficient to give the employee a "full and fair opportunity" to demonstrate pretext. Id. at 1096.

[33]Significantly, the employer need not even claim, for example, that the person hired was more qualified. Id. at 1095.

No doubt in some cases the employee will be able to prevail. See, e.g., Sherkow v. Wisconsin, 630 F.2d 498 (7th Cir. 1980) (plaintiff clearly more qualified than male selectee); Taylor v. Philips Indus., 593 F.2d 783 (7th Cir. 1979) (dismissal for extended medical leave pretext when males not dismissed for similar leave).

The Court made a policy choice that the employer should win. Reasonable men might differ on whether that is a good or bad result. But clearly, as a policy decision, it disadvantages women. Legislative reversal of Burdine would, conversely, advantage women to the disadvantage of individual employers and perhaps men. This is a clear policy choice which need not and, perhaps, should not be left to the courts.

Turning now to disparate impact, the second type of discrimination with which Title VII attempts to deal, an individual employee may not need to show that she has been personally discriminated against. Instead she may be able to prove that an employment practice results in a discriminatory effect on a sex-based class; i.e., women, of which she is a member. Plaintiff, in contrast to the discriminatory treatment cases, need not prove an intent to discriminate. The employment practice may be unlawful even though it is gender-neutral and the employer's sex-based motive cannot be proven. The plaintiff need only prove that the employment practice falls more harshly on one sex than the other, subject to certain statutory and court-made defenses.

Statistical evidence is obviously relevant here, with all of the pitfalls attendant thereto. For example, consider hiring practices. What is the relevant sample when examining the hiring practices of a business in a particular community? Are the female faculty hiring practices of the University of North Carolina to be measured against the relevant labor force nationwide? East of the Mississippi? East coast United States? Southeastern United States? North Carolina? The Piedmont area? Wake and Orange Counties? Chapel Hill?[34] Not surprisingly, then, the use and relevance of statistical surveys has given rise to a continuing controversy between lawyers and statisticians.[35]

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[34] Cf. Hazlewood School Dist. v. United States, 433 U.S. 299 (1977) (relevant labor force area for black teachers: St. Louis County or St. Louis City?).

[35] See generally Shoben, Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII, 91 Harv. L. Rev. 793 (1978); Cohn, On the Use of Statistics in Employment Discrimination Cases, 55 Ind.L.J. 493 (1980); Shoben, In Defense of Disparate Impact Analysis Under Title VII: A Reply to Dr. Cohn, 55 Ind.L.J. 515 (1980); Cohn, Statistical Laws and the Use of Statistics in Law: A Rejoinder to Professor Shoben, 55 Ind.L.J. 537 (1980).

More refined statistics may decide the outcome of a particular case. Thus General Motors was able to defeat a disparate impact claim based on 30 years of hiring practices by showing its hiring practices were non-discriminatory, as a statistical matter, during the five years immediately prior to suit. Movement for Opportunity & Equality v. General Motors, 622 F.2d 1235 (7th Cir. 1980).

Another possible indicia of discrimination is applicant flow measured against hiring rate. EEOC regulations, for example, provide that women are adversely impacted when they are hired by a particular business at a rate less than $^4/_5$ that of male applicants. 29 C.F.R. § 1607.4D. (1982)

There are a number of defenses to the prima facie disparate impact allegation. Policy issues are again suggested. Women in the work force can be aided or disadvantaged by a narrowing or expansion of the available defenses. While North Carolina, for example, retains the option of adopting and vigorously enforcing anti-discrimination legislation tougher than Title VII, the disparate impact defenses under Title VII potentially provide some useful guidance.

The courts themselves have developed a business necessity defense. If the employer can show that the gender-neutral practice which excludes a Title VII protected class is related to job performance, then the courts will not invalidate the practice.[36] But such factors as height requirements for police officers, which discriminate against women, will not do,[37] though one for airline pilots will pass judicial muster if related to the ability to reach cockpit controls.[38] But where a gender-neutral standard is largely subjective, "a claim of business necessity can seldom override a statistical showing of adverse impact."[39] Disparate impact cases in which the business necessity defense is raised are similar to discriminatory treatment cases in that the plaintiff may rebut the defense if she can show that it is a mere pretext.[40]

In addition to the judicially created defense of business necessity, Title VII itself includes the four affirmative defenses (which, like the business necessity defense, must be proven by the employer if he is to prevail) found in the Equal Pay Act. It will be remembered that those defenses provide that an employer can defeat liability by demonstrating that the practice is validly based on a system of seniority, merit, quantity or quality of production, or any factor other than sex. Thus, for example, a bona fide seniority system is not illegal even if it perpetuates past discrimination.[41]

The general catch-all defense, a factor other than sex, has again been widely litigated. A trainee salary scheme based on earlier salaries (which discriminated against female employees) was held not a factor other than sex.[42]

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[36]See Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

[37]Horace v. City of Pontiac, 624 F.2d 765 (6th Cir. 1980).

[38]Boyd v. Ozark Air Lines, 568 F.2d 50 (8th Cir. 1977).

[39]C. Thomas, supra note 3, at 251.

Past discriminatory practices will not necessarily result in a woman's overcoming a business necessity defense. Thus, the fact that prior to enactment of Title IX in 1972 most professional and graduate schools had strict quotas on female admissions did not aid a woman in her challenge to the requirement of a doctorate degree for the teaching of mathematics at the university level. Campbell v. Ramsay, 631 F.2d 597 (8th Cir. 1980).

[40]New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979).

[41]International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

[42]Kouba v. Allstate Ins. Co., 523 F. Supp. 148 (E.D.Cal. 1981).

Payment of a market rate (which reflected past discrimination against women) was ruled not a factor other than sex under the Equal Pay Act,[43] and analagously would not be such a factor under Title VII. Higher life insurance premiums paid by women based on actuarial tables reflecting greater female longevity have been found unlawful as not based on a factor other than sex.[44] The result of the affirmative defenses seems to be a clear increase in litigation accompanied by a lower predictability of result and hence an encouragement of subtle discrimination.

A final sometimes important defense provided by Title VII is that for a bona fide occupational qualification (BFOQ) reasonably necessary for operation of a particular business. However, the BFOQ exception is limited to hiring and assignment only and is not relevant to other employment practices. The exception has been construed to be quite narrow and the courts will not allow sexual stereotypes to determine a particular outcome.[45] Perhaps the most significant result of BFOQ litigation has been the invalidation of single sex job classifications (e.g., male only coal miners) and the many state labor laws that frequently reinforced such practices.

Disparate impact cases, it turns out, remain a difficult area fraught with litigation. The standards to be applied are often rendered amorphous by given circumstances. The results have helped women, but not to the extent of clearly and certainly discouraging attempts at discrimination and prolonged litigation.

Policy Issues Raised by Legal Developments

Where does all this lead us? The policy issues raised by the legal aspects of women's labor force participation are relatively clear. Constitutional, statutory, and case law have aided women's entry and advancement in the labor force. But the matter is yet one of degree with discriminatory treatment hardly non-existent. Society does not yet show a clear and unambiguous insistence on equality in the treatment of working women.

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[43]Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

[44]Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978).

[45]See C. Thomas, supra note 3, at 273-74.

Sex-plus has also not found a particularly sympathetic judicial ear. Thus, for example, alleged customer preference for female stewardesses has not been successful in excluding males from such positions. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971). But a BFOQ exception based on physical capacity was sustained in the circumstances where a maximum security prison housed 20% sex offenders and was characterized by "rampant violence" in a "jungle atmosphere." Dothard v. Rawlinson, 433 U.S. 321 (1977). Compare Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969) (BFOQ established only upon showing all or substantially all women unable to perform duties) with Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971) (invalid to exclude women on basis of occasional need to lift in excess of 50 lbs).

North Carolina could improve the lot of working women by enacting legislation a good deal more forceful than Title VII. Such legislation could apply to all employers and all employment practices and limit the available defenses to business necessity. The ultimate burden of proof could, as a matter of legislative prerogative, always remain on the employer with the employee merely needing to raise an inference (the prima facie case) of unlawful discrimination. Potential remedies could be made even greater than the federal ones. Hiring, reinstatement, and back-pay would, of course, be available. Seniority could be irrelevant to reinstatement and lay-off practices. Attorneys fees and court costs, as under Title VII and the Equal Pay Act, could be available. But, in addition, a state statute could provide for the trebling--or some similarly high rate--of damages and the loss of tax deductions and the like as part of the penalty for discrimination.

Clearly, there are value judgments to be made. Tougher laws mean a narrowing of the employer's discretion with potentially significant and inefficient results. Men might be disadvantaged unfairly if not unconstitutionally.[46] This outcome would be particularly worrisome if in most families men continue to be the sole or principal breadwinner. It is certainly a thorny thicket, but one that should be addressed if North Carolina entertains a serious concern for promoting equity for working women.

Comprehensive Policy Concerns

Women's increased labor force participation raises many serious concerns, some of a personal nature and others with national and even global consequences. As a matter of equity, we feel that women's increased participation in the work force should not be artificially thwarted. But policymakers should begin to plan for the social results of such a continuing development. Here is a partial list of the issues that deserve attention:

1. Day Care: As women's participation in the labor force increases, the need for adequate day care becomes more evident. Recently, "labor force participation rates have been rising faster among mothers of children under six than among any other group of women" (Hofferth, 1979, p. 650). The potential consequences cannot be avoided. Public day care vs. private day care, subsidized private day care, minimum wage policies that encourage the purchase of private day care, ill-child policies, sanitation and communicable diseases in day care centers, and early emotional and psychological diagnosis and treatment are just a few of the public policy issues raised by increased reliance on day care facilities.

2. Delayed Child Bearing: Delayed child-bearing that often accompanies a woman's work force participation also suggests potential future issues. Given the increased risk of birth defects for child-bearing older women, for example,

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[46]While affirmative action programs are not required by the federal statutes, voluntary programs and consent decrees as a remedy for past discrimination have been upheld, even over challenges of reverse discrimination. See C. Thomas, supra note 3, at 288-301. See generally 29 C.F.R. § 1608.1-.12 (1982) (EEOC Affirmative Action regulations).

society may have to provide for more services for the handicapped, both in day care facilities and public schools.

3. Work Arrangements: Alternatives to day care should be examined and encouraged by public policies where appropriate. So flextime, part-time work, homework, and 10 month positions should be on the agenda of North Carolina's policy considerations. At the same time, the needs of professionals and non-professionals may differ drastically. In addition, parental role fulfillment should be addressed. It may be appropriate for society to provide greater incentive for having a parent as opposed to an alternate caretaker raise a family's children, for example by greater use of tax deductions or payment of a family allowance if one parent remains home during a child's early years.

4. Volunteerism: Traditionally, women out of the workforce have performed much of the volunteer work done in this country. As more and more women choose to seek remunerative employment, the pool of potential volunteers shrinks accordingly. Society is then faced with providing such essential services itself or paying private providers to do so.

5. Lower Fertility: Greater labor-force participation by women correlates with lower fertility (Hofferth, 1979). As the example of Sweden demonstrates, the consequences of lowered fertility rates may pose long-term concerns for American society.

a) Social Security and Other Public Pension Plans: Lower fertility rates mean a shrinking base for public pension plans. The financial weakness of the Social Security Retirement Trust Fund is already known. Declining birth rates among working women will further exacerbate this problem.

b) Shrinking School Population: Lower fertility rates mean lower public school participation. Combined with increased day care needs, one is forced to consider whether in the future more and more funds should be shifted from public education to public or subsidized private day care.

c) National Defense: Declining birth rates might very well affect nuclear arms policies. Nuclear disarmament suggests that elimination of the nuclear deterrent might require the United States to maintain a substantial standing army in western Europe. (In fact, it has been suggested that the current lack of such an army at least indirectly inhibits the United States from seriously engaging in nuclear disarmament negotiations.) An alternative to nuclear reliance, then, would require many more citizens in uniform. But whether such a labor intensive army can be maintained in the face of projected lower fertility rates is doubtful.

We mention national defense simply to highlight the need for a long-term examination of and planning for the not readily apparent consequences of increased labor force participation by women. Such participation may prove to be one of the most significant developments in the history of this country with effects reaching far beyond simple questions of legal equity. It is past time for policymakers to begin shaping the future accordingly, rather than waiting for the year 2000 and then engaging in crisis management that can only do too little too late. Toward this end, we turn now to a detailed analysis of pay equity for women.

Equal Pay for Comparable Worth: The Crucial Issue

Current Law

With little question, one of the most significant obstacles to pay equity for women is the Equal Pay Act's requirement that claims under the Act be premised on a showing that, in a given business, women are performing work that is equal or substantially equal to that being performed by men.[47] Women may be performing tasks of comparable (or superior) worth to the business while being paid less than men who are contributing no more to the business. Yet there exists no actionable claim under the Equal Pay Act as long as there is no man performing the same or substantially the same work for higher pay.[48]

Job typing is a national phenomena. Generally, the great number of women workers tend to be hired for certain types of jobs.[49] Those jobs are viewed as "women's work" and are traditionally paid lower relative rates than men's work. This undervaluation of women's work through occupational segregation and wage discrimination appears to contribute significantly to the gap between wages paid men and women.[50]

The problem is further exacerbated by market forces in a time when more and more women are seeking employment. De facto occupational segregation restricts the number of jobs available for women. In turn, the fact that women are discouraged from seeking more highly paid men's jobs assures an oversupply of women for the available women's jobs. This oversupply, known as "crowding," undermines any potential market incentive to significantly increase the pay for women's work.[51] But as long as all persons holding such female dominated positions, including the few men who may seek them out, are not subjected to a

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[47] See notes 12-21 supra and accompanying text.

[48] It will be remembered that under the Act at least one male and one female must be performing equal or substantially equal work so that a comparison can be made to determine if a violation of the Act exists.

[49] Two-thirds of female workers are in sales, service or clerical jobs. L. Howe, Pink Collar Workers, Inside the World of Women's Work 16 (1977).

[50] While women are paid less due to their often interrupted labor force participation, lower educational attainment and lower job seniority, about two-thirds of their wage differences relative to men appears attributable to occupational segregation and wage discrimination. Gasaway, Comparable Worth: A Post-Gunther Overview, 69 Georg. L. J. 1123, 1126 (1981). But see Polachek, Differences in Expected Post-School Investment as a Determinant of Market Wage Differentials, 16 Intnl. Econ. Rev. 451-70 (No. 2, June 1975) (wage gap between women and men largely due to women's lower investment in training and schooling because of expectations of only intermittent participation in labor force). See also Mincer & Polachek, Family Investments in Human Capital: Earnings of Women, J. of Pol. Econ. S76-S108 (Mar.-Apr. 1974).

[51] See Gasaway, supra note 49, at 1131 n.n. 73-74.

sex based wage differential, no violation of the Equal Pay Act has occurred. This is so even though the women's work may be even more valuable to a particular business than that performed in comparable male positions. Thus, through informal societal pressure to preserve job typing and through subtle hiring and assignment practices, vast numbers of women find themselves underpaid relative to men despite the usual belief that the Equal Pay Act assures equal pay between the sexes.

A pay system based on comparable worth, in contrast, could eliminate unjustified pay differentials. If legally an employer were required to set the compensation for positions based on their relative worth to the business, then the present need to base an equal pay claim on a showing of a higher paid male performing substantially the same work would be circumvented. If, for example, clerical work, predominantly performed by women, can be shown to have worth to a business comparable to that of equipment maintenance work, predominantly performed by men, then the wage scales for those positions would have to be equal.[52] Job typing and occupational segregation would, then, not serve to depress women's wages.

The ultimate legal acceptance of a comparable worth theory has yet to be realized under existing federal legislation. Clearly, it is not cognizable under the judicial development of the Equal Pay Act. Arguably, a comparable worth claim is sustainable under Title VII. However, while the Supreme Court recently ruled that Title VII is broader than the Equal Pay Act[53] and does not include the need to demonstrate equal or substantially equal work to sustain a pay discrimination claim,[54] the Court has for the moment refrained from reading a comparable worth standard into Title VII.[55] Moreover, the lower federal courts which have addressed the issue have rejected using the comparable worth

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[52]If the comparable worth to the business of clerical work, for example, is 90% that of physical labor done by men, then the clerical wage scale should be 90% of what is paid the male dominated positions. In other words, the differential would be worth based rather than sex based. A comparable worth pay system assumes the ability to adequately evaluate the comparable worth of different compensable factors, for example, manual dexterity versus physical strength. See notes 65-67 infra and accompanying text.

[53]This is the case when Title VII applies to a given situation. However, as previously noted, Title VII coverage is limited by express statutory provisions and the need to show a connection with interstate commerce. See note 23 supra and accompanying text.

[54]County of Washington v. Gunther, 101 S. Ct. 2242, 2247 (1981).

[55]The Gunther Court noted that "[w]e do not decide in this case the precise contours of lawsuits challenging sex discrimination in compensation under Title VII." Id. at 2254. But intentional sex discrimination with respect to wages, for example, is clearly prohibited by Title VII.

standard for Title VII relief.[56] It thus remains for the Supreme Court, the Congress, or the states--through their own legislative processes--to make comparable worth the instrument of wage equity for women.

Some states, North Carolina not included, have enacted statutes requiring equal pay for "comparable work."[57] Implementation though has lagged and private litigants have found the courts narrowly interpreting such statutes and not particularly sympathetic to or comfortable with comparable worth claims.[58] The implication is that the promise held by the comparable worth standard involves serious policy choices relating both to enactment and implementation. But it does appear that much can be done to enhance the lot of working women by effectively enacting and implementing a comparable worth statute.

Policy Decision: Analysis Criteria and Implementation Issues

Any policy decision involves consideration of value criteria which help illuminate the choices to be made. An effective policy model which lends itself well to evaluating adoption and implementation of a comparable worth standard is the Bush Model developed at the Bush Institute for Child and Family Policy at the University of North Carolina, Chapel Hill.[59] Employing the Bush Model, whether a state decides to adopt a comparable worth standard seems to involve considerations of equity, preference satisfaction, stigma, and efficiency. Implementation choices suggest questions of political feasibility, technical feasibility, and cost.

Equity. Equity seeks to treat equals as equals. It is assumed that all workers are in the first instance equal. If women, then, are performing tasks that are of equal worth to an employer as those tasks being performed by men, equitable treatment requires equal pay. If the woman's task is of a worth 85% that of the male oriented task, then equity requires that the woman's wages be 85% that of male employees. Depression of women's wages due to job typing and occupational segregation simply cannot be justified when viewed in terms of equitable treatment. Indeed, the case for adoption of a comparable worth standard has been called "morally compelling."[60]

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[56]See, e.g., Lemons v. Denver, 620 F.2d 228, 228-29 (10th Cir.), cert. denied, 449 U.S. 888 (1980); Christensen v. Iowa, 563 F.2d 353, 355-56 (8th Cir. 1977); Ammons v. Zia Co., 448 F.2d 117, 120 (10th Cir. 1971); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970).

[57]See 3 Employers Practice Guide (1980 CCH) ¶ 20,080. North Carolina has simply enacted general legislation which tracks the requirements of Title VII. No. Carolina Gen. Stat. § 143-422.2. See North Carolina Dept. of Corrections v. Gibson, 293 S.E.2d. 664 (N.C. App. 1982).

[58]See Gasaway, supra note 49, at 1147-48 (discussing cases).

[59]See MacRae & Haskins, Models for Policy Analysis in Models for Analysis of Social Policy 1-35 (R. Haskins & J. Gallagher eds. 1981).

[60]Gasaway, supra note 49, at 1125.

Preference satisfaction. Adoption of a comparable worth standard should enhance worker preference satisfaction. Undoubtedly there are some men who would rather do "women's work" were it not for the occupational pay discrimination. Their financial ability, then, to choose such work will be aided by assigning a comparable economic worth to such positions. It would be expected in turn that the likely migration of more men to jobs previously held almost exclusively by women would help undermine job typing and in the long run lead to greater societal rejection of occupational segregation. Such a result would ultimately enhance the job preference satisfaction potential of women as well as men.

Stigma. Job typing is another way of defining stigma. Certain jobs simply have come to be derisively thought of as women's work (with a subsequent depression of wages). To the extent that we are correct in our preference satisfaction analysis in postulating that a comparable worth standard would eventually undermine job typing, then the stigma attached to certain jobs would be significantly reduced if not eliminated.

Efficiency. Literally, efficiency means productivity without waste.[61] Applying that literal definition, it cannot be inefficient to pay women their comparable worth to a business unless it is considered inherently wasteful to pay women their relative economic worth. A system which rejects women's claims for equal pay with men based on the comparable worth of their services to a business indirectly accepts a classification system which relegates women to a second class status.

So, if bias is not an acceptable criterion of choice, a comparable worth standard can be seen as inefficient only if one ignores the underlying social factors at work in viewing the potential increased cost of production as inefficient. Since it is unlikely for a number of reasons that comparable worth would lead to a downgrading of men's wages,[62] adoption of the standard does equate with increased business costs and in that sense is "inefficient."[63] Clearly, the magnitude of that cost is not insignificant. Theoretically, if there were an equal number of men and women in the work force, utilizing the generally accepted notion that women's wages are about 40% less than men's and about two-thirds of that differential is caused by occupational segregation and wage discrimination, then roughly 27% of the national total of men's wages would logically represent the aggregate jump to be expected in women's wages as a result of basing wages on comparable worth.[64] But, again, it does not seem legitimate to view the comparable worth standard as inefficient if it is unacceptable to view paying women their relative worth as wasteful.

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[61] Webster's New Collegiate Dictionary 359 (1981).

[62] See note 64 infra and accompanying text.

[63] One would also expect to see an inflationary impact on the economy.

[64] One management consultant has estimated that the additional wages to be paid would only be $2 billion annually. See The New Pay Push for Women, Bus. Week 69 (Dec. 17, 1979) (estimate by Thomas Cody of Lester B. Knight & Assoc.).

Political feasibility and implementation schemes. Three possible methods of implementation also affect whether a comparable worth standard has any chance of being adopted.

First, a comparable worth scheme could require the raising of women's wages while holding men's wages constant. This is the most expensive proposal and thus raises cost issues potentially unacceptable not only to the business community but also to Congress and state legislatures. Second, a comparable worth system can require an adjustment of wages so that women's wages are upgraded and men's wages are lowered to the accepted "worth level." Since men have a dominant hold on political (including union) power in this country, such a scheme would appear politically infeasible.[65] Finally, an incremental system could be chosen. Some occupations which have been egregiously undervalued could be singled out for immediate adjustment. For other occupations, new hires and, on an annual basis, a certain percentage of current workers (probably based on seniority) could be paid their comparable worth. In the long run, all women would be paid their relative worth to a given business and in the interim businesses would have the opportunity to adjust gradually to their increased labor costs.

Generally, in these hard economic times, the tide would seem to be running against increasing labor costs by paying women their comparable worth. However, as times improve, the possibility of political acceptance of a comparable worth standard would likely also improve. Furthermore, political acceptance would probably be enhanced if compromise could be reached over incremental implementation.

Technical feasibility. Idaho has successfully implemented a job classification system embracing many of the tenets of comparable worth.[66] Thus, one might conclude that technical difficulties can be overcome.[67] What is required is a rigorous process designed to assign, with some relative objectivity, a worth to a position within a given business. Obviously, such assignment of worth involves inherently subjective decisions and no system can be designed which is perfectly free of bias. However, a well-designed process can minimize potential abuses.

Professor Gasaway has outlined one such system. She argues for a comparable worth process requiring: (1) detailed job descriptions which identify and possibly weight compensable factors; (2) a hierarchial ranking of jobs based on their worth to a given business; (3) an ultimate assignment of job worth to the business, possibly using point ranking schemes to differentiate between complex positions; and (4) a disputes resolution mechanism perhaps centered in a governmental agency.[68]

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[65]It probably is not legally permissible to downgrade wages for men as men. For example, the Equal Pay Act expressly prohibits lowering the wages of one sex to achieve equal pay. 29 U.S.C. § 206 (d)(1) (1976).

[66]See Gasaway, supra note 49, at 1148-49.

[67]See id. at 1149.

[68]Id. at 1155-60.

Various potential designs for assigning comparable job worth appear possible. Technical feasibility, then, seems not an insurmountable obstacle to implementation.

Cost. Increased business costs in the form of higher wages would seem a likely result of adopting the comparative worth standard.[69] In addition, businesses would have to shoulder the costs of implementing and states would have to monitor an appropriate job classification scheme. Yet many employers already use a job evaluation system and the cost of substituting one system for another would not appear prohibitive.[70] Further cost savings, as noted before, might be achieved by incremental implementation.

Some economists have argued that the unemployment rate for women would increase as a result of utilizing comparable worth.[71] But the actual effects are hard to predict. Working women, for example, already experience a higher percentage of unemployment,[72] no doubt caused in part by job typing and resultant crowding. But, admittedly, there is a risk of somewhat increased unemployment rates whenever business costs rise. Moreover, as noted previously, the inflationary impact of a comparable worth system cannot be doubted. However, such concerns do not appear to be sufficient reasons for continuing to tolerate the inequitable depression of women's wages.

Moreover, there are costs to not implementing a comparable worth system. Women already suffer disproportionately from downturns in the national economy in terms of forced unemployment.[73] Furthermore, occupational segregation and wage differentials are intensified in such hard times.[74]

Recommendation

This analysis has considered the costs and benefits of implementing a pay system based on the comparable worth of employment positions within a given

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[69]The state of Washington abandoned consideration of a comparable worth system when in 1976 the out-going governor requested $7 million in his proposed 1977 budget to implement the scheme. See id. at 1160 n. 385.

[70]See id. at 1163.

[71]See C. Lindsay, Equal Pay for Comparable Work: An Economic Analysis of a New Antidiscrimination Doctrine 33 (1980).

[72]See United States Nat'l Comm. on the Observance of Int'l Women's Year, The Spirit of Houston: The First Nat'l Women's Conf. 43 (1978).

[73]Due to their relative lack of seniority, even with respect to minority men aided earlier on by the Civil Rights movement, women have lost their jobs in disproportionate numbers during the current recession. "'While other minority percentages have remained fairly constant, women have been impacted more by the layoffs because they were hired late.'" Quotas Under Attack, Newsweek 96 (April 25, 1983) (quoting Don Forchioni of Ford Motor Company).

[74] See Gasaway, supra note 49, at 1165.

business. It has considered the constraints on adoption and implementation. The values involved have been viewed crucial and thus given lengthy examination.

Based on this exercise, we strongly favor adoption of comparable worth legislation and governmental oversight of its implementation. Funding for administration would clearly be required. Funds may also be necessary to pay for court costs relating to early-on litigation to define the contours of such a new and dramatically powerful tool available to women in their search for equity in the workplace.

We recommend that the federal government amend both the Equal Pay Act and Title VII to incorporate comparable worth as the standard for evaluating "equal" pay. Failing that, states such as North Carolina should adopt and implement such legislation themselves. The benefits appear to outweigh the costs, and, at any rate, the case for comparable worth does in fact seem to be morally compelling.

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